

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

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To be argued by
ARTHUR L. LIMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES ex rel. MARTHA CARMONA, and ROBERTA FOWLE

Petitioners-Appellees,

-against-

BENJAMIN WARD, Commissioner of the New York State
Department of Correctional Services; FRANCES CLEMENT,
Superintendent, Bedford Hills Correctional Facility,
Bedford Hills, New York; FRANK CALDWELL, Acting
Chairman of the New York State Board of Parole;
and the NEW YORK STATE BOARD OF PAROLE,

Respondents-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF PETITIONERS-APPELLEES

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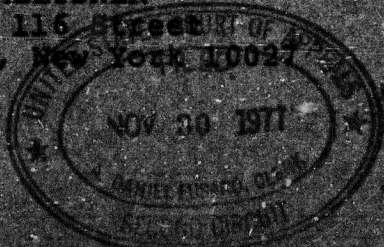


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UNITED STATES COURT OF APPEALS
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NO. 77-2110

UNITED STATES ex rel. MARTHA CARMONA, and ROBERTA FOWLER

Petitioners-Appellees,

-against-

BENJAMIN WARD, Commissioner of the New York State
Department of Correctional Services; FRANCES CLEMENT,
Superintendent, Bedford Hills Correctional Facility,
Bedford Hills, New York; FRANK CALDWELL, Acting
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and the NEW YORK STATE BOARD OF PAROLE,

Respondents-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF PETITIONERS-APPELLEES

Issues for Review

(1) Whether the court below was correct in holding, after a full evidentiary hearing, that the mandatory life sentences imposed upon Martha Carmona for the possession of one ounce of a substance containing cocaine and upon Roberta Fowler for the \$20 sale of 0.13 gram (.00455 ounce) of a substance containing cocaine were so disproportionately severe as to constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution, in the light of uncontroverted evidence that

- a) the sentences imposed upon petitioners are equalled in the State of New York only by those imposed for premeditated murder, felony murder, extremely reckless or depraved killing, intentionally damaging an occupied building by explosion, and kidnapping where the victim dies;
- b) the sentences imposed upon petitioners greatly exceed those imposed by the State of New York for forcible rape or rape of a female who is physically helpless or less than eleven years old, first degree burglary and first degree robbery;
- c) the sentences imposed upon petitioners are substantially more severe than the punishment they would have received for the same crimes in any other jurisdiction in the United States;
- d) at the time petitioners were convicted they could not have pleaded to a felony that did not carry a mandatory life term, although they could have done so had they been indicted for any non-drug felony, including capital crimes;
- e) while petitioners may be paroled, they are subject to reincarceration for life should they violate any of the conditions of their parole; and
- f) the mandatory life sentences imposed under the 1973 drug law have failed to make a measurable contribution to acceptable goals of punishment

and hence are nothing more than the purposeless and needless imposition of pain and suffering.

(2) Whether the mandatory life sentences imposed upon Carmona and Fowler constitute cruel and unusual punishment and a denial of due process and equal protection of the laws in violation of the Eighth and Fourteenth Amendments in that they are integral parts of an irrationally broad, inflexible, and inevitably arbitrary sentencing scheme which, by its terms and in operation,

- a) fails to take account of the relative seriousness of particular drug offenses, subjecting almost all drug offenders to lifetime imprisonment;
- b) grants standardless discretion to prosecutors to recommend lifetime probation instead of lifetime imprisonment to the more highly placed offenders; and
- c) grants standardless discretion to the Parole Board to determine whether a drug offender should ever be released from incarceration.

Introduction

Since its enactment by the New York State Legislature, the set of amendments collectively referred to as the "1973 Drug Law" has been under continued attack by, inter alia, New York's Chief Executive (Message of the Governor dated August 12, 1975; Governor's Program Bill, May 18, 1976); prosecutors whose responsibility it is to

enforce the law (Trial transcript ("Tr") 157-58, 160-61, 163-65); other State officials charged with administering the law (A. 100-11);^{1/} and by private organizations, like the Association of the Bar of the City of New York, which have traditionally manifested an interest in and concern for the criminal justice system (A. 118-125).

Because of pressure from these and other critics, the drug law has been modified in certain respects since its passage. But its principal vice remains unchanged: minor offenders like Martha Carmona and Roberta Fowler are subjected to the same Draconian punishments as people at the top of the drug distribution chain. Suffolk County Court Judge Signorelli passionately expressed the frustrations of many trial judges forced to sentence people pursuant to this harsh and inequitable law when, in a Memorandum Opinion dated June 12, 1975, he exclaimed:

These biographical sketches [of the 12 defendants before the court] graphically demonstrate the basic inequality and patent unfairness of these laws. Some of the defendants are potentially eligible youths; others are adults with no prior criminal history and are of otherwise impeccable backgrounds who should be afforded leniency; and there are, of course, those who are recidivists who possess violent propensities and are potentially dangerous. Notwithstanding their sharply contrasting backgrounds, the instant drug laws mandate that all of these defendants be dealt with and sentenced in the same precise manner....

^{1/}

This form of citation is to pages of the Joint Appendix.

An inherent potential for injustice is built into these laws by placing the judge in a strait-jacket where he is deprived of sentencing alternatives and is precluded from evaluating each case on its own merits, to be merciful or harsh as the particular case may warrant. Are we really accomplishing the ends of justice when we mete out the same kind of punishment to the insignificant street pusher as we would to the heavy dealer of drugs? Or, for example, how are we successfully combatting the evils of drug addiction when we deny an eligible youth his right to youthful offender status and sentence him to life imprisonment as an adult when he is convicted of selling some LSD pills worth \$10.00 to an undercover police agent? Furthermore, is society being unduly retributive when the law demands that the Court sentence a junkie to life imprisonment for assisting a friend, another junkie, by giving him a nickel bag of heroin?...

This legislation, since its enactment, has, instead of alleviating the ills of drug abuse and addiction, created chaos and much consternation among those who are responsible for the administration of criminal justice.

People v. Donigan, Ind. No. 417-74. Similarly, but more succinctly, a Monroe County Court judge explained his reluctance to sentence a defendant under the 1973 drug law by proclaiming: "This life sentence provision...offends the conscience of the Court...". People v. Mosley, 78 Misc. 2d 736, 358 N.Y.S.2d 1004, 1011 (Cty. Ct. Monroe Cty. 1974).

The political climate which spawned this singularly harsh law is mirrored in the former Governor's Annual Message to the Legislature on January 3, 1973, in which he appealed for new drug legislation, prophesying that "[w]e face the risk of undermining our will as a people—and the ultimate destruction of our society as a whole." 1973

McKinney's New York Session Laws 2318. The legislative response to this strident executive call to battle was an ill-conceived law mandating for drug offenders what the New York Court of Appeals acknowledged is "exceptionally severe punishment." People v. Broadie, 37 N.Y. 2d 100, 115, 371 N.Y.S. 2d 471, 479, 332 N.E.2d 338, cert. denied, 423 U.S. 950 (1975).

The centerpiece of the 1973 drug law is the threat of imprisonment for life for all who are swept within its net. Caught in that net are little fish as well as big, casual users as well as big-time traffickers, each equally liable to remain forever in the custody of the State.

In January 1975, Martha Carmona pleaded guilty to criminal possession of a controlled substance in the second degree, specifically, possession of an ounce of a substance containing cocaine. She was sentenced to a term of imprisonment of six years to life, the minimum possible for an A-II felony under the 1973 drug law. Her conviction was affirmed on appeal, and leave to appeal to the New York Court of Appeals was denied.

In February 1974, Roberta Fowler was convicted by a jury of criminal sale of a controlled substance in the third degree, specifically, 0.13 gram (.00455 ounce) of a substance containing cocaine (approximately one dose with a street value of about \$20). She was sentenced to a term of imprisonment of four years to life, the four year

minimum being in the middle of the range fixed by law for an A-III felony. Her conviction was upheld on appeal and was affirmed by the New York Court of Appeals sub nom. People v. Broadie, supra.

In late 1975, Carmona and Fowler petitioned the United States District Court for writs of habeas corpus seeking a declaration that various provisions of the 1973 drug law were unconstitutional. The court below focused narrowly on the provisions of the 1973 drug law mandating a maximum term of life imprisonment, and declared them unconstitutional as applied to petitioner-appellees (hereinafter "petitioners") Carmona and Fowler. Whether that determination is correct is the only question before this Court.

On this appeal, the State stresses its right to regulate illegal drug traffic. Petitioners do not take issue with the power of the State to define certain conduct as criminal and to prescribe punishments for it. Nor do petitioners question here the power of the State to address the problem of drug abuse. The court below was manifestly aware of the State's prerogatives, and exhibited great deference to them. Nevertheless, Judge Motley concluded, as must this Court, that encomiums to the power of the State inevitably miss the mark where the principal issue is whether that power has been exercised in an unconstitutional manner or in the service of an unconstitutional end.

There is, surely, room in a federal system for a diversity of penological approaches to a problem as widespread and difficult as that of the illegal drug trade. [Citations omitted.] Moreover, the concededly vast extent of the drug problem in the State and especially the City of New York has been widely noted, and was certainly paramount in the minds of the concerned legislators who enacted the 1973 drug law in New York. And the State clearly has "broad power" to regulate the narcotic drug traffic within its borders. Robinson, supra, at 664. However, there necessarily remains a constitutional limitation upon the State's freedom to undertake even the most enlightened and well motivated approach to the most intractable and corrosive social problems.

(A. 68) (footnotes omitted).^{2/}

^{2/}

Justice Stewart addressed this same issue in his plurality opinion (joined by Justices Powell and Stevens) in Gregg v. Georgia, 96 S.Ct. 2909, 2925 (1976).

Of course, the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts. This does not mean that judges have no role to play, for the Eighth Amendment is a restraint upon the exercise of legislative power.

"Judicial review by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. In this respect, Eighth Amendment cases come to us in no different posture. It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the constitutionality of punishment and that there are punishments that the Amendment would bar whether legislatively approved or not." Furman v. Georgia, supra, 408 U.S., at 313-314, 92 S.Ct., at 2764 (White, J., concurring). See also id., at 433, 92 S.Ct., at 2825 (Powell, J., dissenting) (footnote omitted).

(footnote continued)

Perhaps recognizing that invocations of its power to regulate drug traffic prove both too much and too little, the State also offers as a justification for the uniquely severe sanctions of the 1973 drug law the fact that there are serious crimes which are not drug offenses but which, as a statistical matter, correlate with drug abuse.^{3/} In essence, the State contends that the drug law provides a means for controlling these collateral crimes. This theme was picked up by the New York Court of Appeals in People v. Broadie, supra, and played upon in that court's decision upholding the challenged drug law. The court below, however, resisted this siren song, reasoning that "it is necessary to judge the proportionality of a punishment with relation to the actual offense committed; a penalty cannot be justified solely by the potential for more serious conduct, even though

(footnote continued)

And in his concurring opinion in Furman v. Georgia, 408 U.S. 238, 269 (1972), Justice Brennan observed:

Judicial enforcement of the [Cruel and Unusual Punishments] Clause...cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes. That is precisely the reason the Clause appears in the Bill of Rights.

^{3/} Petitioners do not, of course, concede the validity of this "fact", since scholarly opinion on the subject is divided. See, e.g., Hearings on Employment Problems of the Rehabilitated Addict Before the New York City Commission on Human Rights (January 8, 1973) (statement of Dr. Isidore Chein).

it may be violent and dangerous" (A. 69). This is especially true where, as here, the actual commission of the feared collateral crimes is, in most instances, punished less severely than are the offenses which give rise to the suspicion that more serious crimes may some day be committed.

Finally, it should be made clear at the outset that Martha Carmona and Roberta Fowler do not, in this action, challenge the imposition upon them of minimum periods of imprisonment. Nor do they take issue with the enlightened use of "mandatory", "presumptive", or "determinate" sentencing schemes as a means of assuring swift, certain, limited punishment for carefully defined categories of crime.^{4/} However, the 1973 drug law is far from enlightened or limited, and represents the worst of all possible worlds—a purportedly mandatory scheme imposing inordinately harsh sentences without

^{4/}

The 1973 drug law bears no resemblance to the mandatory sentencing schemes recently proposed by a variety of officials and students of the criminal justice system. Underlying all of those proposals is the theory that swift, certain, but relatively short periods of incarceration for carefully defined categories of crimes will better serve penological purposes than lengthy indeterminate sentences imposed under the guise of rehabilitation. See, e.g., Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment (1976); Committee for the Study of Incarceration, Doing Justice: The Choice of Punishments (1976); Frankel, Criminal Sentences (1972); S.2699 (94th Cong., 1st Sess.) ("A Bill to...establish certain guidelines for sentencing"); H.R. 13577 (94th Cong., 2d Sess.) (President Ford's proposal); Address of Attorney General Edward Levi in Milwaukee, Wisconsin, February 2, 1976.

regard for the circumstances of the crime, while at the same time operating in so erratic a manner as to ensure that its harsh punishments are arbitrarily imposed.

STATEMENT OF THE CASE

Proceedings Below

On December 11, 1975, Martha Carmona and Donna Foggie filed a joint petition for writs of habeas corpus in the United States District Court for the Southern District of New York (A. 8),^{5/} challenging the constitutionality of certain provisions of the 1973 drug law. The following month, Roberta Fowler sought leave to intervene in that action as a petitioner, as did Larry C. Mosley and Doris McNair, who filed a joint motion. The district court subsequently granted Fowler's motion and denied that of Mosley and McNair.

In brief, petitioners contended that the 1973 drug law deprived persons sentenced pursuant to it of rights guaranteed by the Cruel and Unusual Punishments, Due Process, and Equal Protection Clauses of the United States Constitution, in that the law:

^{5/}

The petition was originally filed on behalf of petitioners and "all other persons similarly situated." However, by mutual agreement of the parties and the court, the case proceeded as three individual actions rather than as a class action (A. 84, fn. 1).

(1) mandated that a maximum sentence of life imprisonment be imposed on all class A drug offenders;^{6/}

(2) mandated lifetime parole without possibility of discharge for all class A drug offenders fortunate enough to be released on parole;^{7/}

(3) prohibited persons charged with having committed class A drug offenses from plea bargaining out of the A felony category;^{8/}

(4) prohibited courts from releasing on bail pending appeal persons convicted of class A drug offenses;^{9/}

(5) fixed, as the sole alternative to lifetime incarceration and lifetime parole, a sentence of lifetime probation for which a defendant can become eligible only

^{6/} See pp. 21-22, infra.

^{7/} See p. 25, infra.

^{8/} See fn. 23, infra, and accompanying text.

^{9/} The constitutionality of the provision precluding bail pending appeal, New York Crim. Proc. Law §530.50, viewed singly or as part of the overall sentencing scheme of the 1973 drug law, is not before this Court on this appeal since the court below concluded that as to petitioner Foggie the issue was not ripe, and that petitioners Carmona and Fowler lacked standing to mount a challenge. See fn. 13, infra, and accompanying text.

by providing material assistance to law enforcement officials and thereby obtaining a favorable recommendation from the prosecutor.^{10/}

On November 9 and 10, 1976, a bench trial was conducted by District Judge Constance Baker Motley. One of the four witnesses produced by petitioners was Anthony F. Japha who, in his capacity as Director of the Drug Law Evaluation Project of the Association of the Bar of the City of New York, conducted a study of the operation and effects of the 1973 drug law. Based on that study, Japha documented for the court the failure of the drug law to accomplish the ends fixed for it by its framers (A. 125). Japha also illustrated the way in which the drug law, contrary to its design, penalizes with equal severity first offenders and recidivists, small-scale users and big time traffickers (A. 118-24). Petitioners also called as a witness David Rudenstine who, in his capacity as Director of the Citizens' Inquiry on Parole and Criminal Justice, Inc., conducted an in-depth study of the structure and functioning of the New York parole system. He described the arbitrary process by which parole release decisions ordinarily are made in New York State and concluded that even greater arbitrariness would inevitably attend release decisions made with respect to persons sentenced as A felons under the 1973 drug law (A. 145-51). Rudenstine also outlined the severe restrictions

^{10/}

See fn. 24, infra, and accompanying text.

to which prisoners released on parole are subject (A. 152-68).

Petitioners' other two witnesses were State officials— Edward Elwin, Deputy Commissioner for Parole of the New York State Department of Correctional Services, and William Cashel, the Correctional Department's Area Director of Parole for the New York City metropolitan parole district. Elwin and Cashel outlined the parole supervision process, described the restrictions placed on parolees, and explained what happens to parolees who violate a condition of their parole (A. 100-11). Cashel also described in graphic terms—"it is akin to...surviving with the loss of a limb" (A. 100)— the psychological impact on parolees of the drug law's parole provisions.

Respondents' sole witness was Sterling Johnson, Jr., Special Narcotics Prosecutor for the City of New York. Inter alia, Johnson testified at length about the court congestion and sentencing inequities created by the plea bargaining restrictions in effect at the time of petitioners' sentencings (Tr. 157-58, 160-61, 163-65).

At the close of trial, Judge Motley reserved decision. While the case was thus sub judice, the Legislature passed a bill moderating the challenged lifetime parole provision and permitting class A drug offenders to be discharged

from parole on the same basis as all other parolees.^{11/}
The other change in the law that occurred during the pendency of this litigation—an amendment lifting restrictions on plea bargaining by persons charged with committing an A-III (but not A-I or A-II) drug offense—applies only to persons sentenced after July 1, 1976, and therefore does not affect petitioners herein.^{12/}

Decision Below

On August 4, 1977, the district court issued a fifty-nine page Opinion declaring that the sentences imposed upon Martha Carmona and Roberta Fowler were so disproportionately severe in relation to the gravity of the offenses of which they were convicted as to constitute cruel and unusual punishment (A. 41-99). The district judge did not find it necessary or appropriate to pass upon most of petitioners' other claims (A. 43). She viewed the challenge to lifetime parole as having been rendered moot by the new legislation

^{11/}

At the time the district court issued its Opinion, the bill had passed both houses and awaited the Governor's signature. The Opinion below was written on the assumption that the bill would be signed and in fact it was, one week later. 1977 McKinney's New York Session Laws, Chapter 904.

^{12/}

See fn. 23, infra, and accompanying text.

and determined that neither Carmona nor Fowler had standing to challenge the 1973 drug law's prohibition on bail pending appeal since their appeals were no longer pending.^{13/} She further determined that Donna Foggie, who had already been released on parole, lacked standing to challenge either the mandatory life incarceration or the mandatory lifetime parole provisions of the 1973 drug law. The court therefore viewed Foggie's challenge as "necessarily restricted" to the drug law's limitations on plea bargaining and its predication of probation on a prosecutor's recommendation (A. 79). The court then found no constitutional infirmity in Foggie's conviction or sentence (A. 83).

On August 17, 1977, the court below entered an Order based on the August 4 Opinion, directing the State to unconditionally discharge Martha Carmona and Roberta Fowler from incarceration and custody at the expiration of their minimum terms of imprisonment unless they were

^{13/}

The court had concluded in an earlier opinion that as to Donna Foggie the constitutionality of the no bail provision was not ripe for adjudication. United States ex rel. Carmona v. Ward, 416 F.Supp. 272 (S.D.N.Y. 1976).

resentenced to new and constitutionally appropriate maximum sentences within 90 days of August 4, 1977.^{14/}

On September 8, 1977, the State filed a notice of appeal, and in October successfully petitioned the district court for a stay of its Order pending appeal.

STATEMENT OF FACTS

Petitioners

Martha Carmona is presently serving a sentence of six years to life imprisonment for possession of one ounce of a substance containing cocaine, an A-II felony under the 1973 drug law. The court below found as follows, respecting her background:

Ms. Carmona is a forty-one year old woman who, though born in Puerto Rico, has lived in New York City since early childhood. As a child, she was given by her married parents to an aunt, who emigrated to New York and raised her in that city. In 1953, she dropped out of high school, assertedly in order to earn money to send to her parents in Puerto Rico. After dropping out of school, she had worked from 1960 to 1973 as a sewing

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The Order also provided--in response to Donna Foggie's expressed concern that even though she was then already on parole, she remained vulnerable to re-incarceration for life should she be deemed to have violated a condition of her parole--that her petition be dismissed without prejudice to later challenging a failure to discharge her from parole at the point she first becomes eligible for such discharge, and without prejudice to filing a new petition challenging her original life sentence in the event of a re-incarceration pursuant thereto (A. 7).

machine operator for a garment manufacturer, and from 1973 until her arrest in 1974, she worked part time for a beauty salon in Manhattan. Though presently unmarried (she was married at age 18 and divorced a year later), she has a daughter approximately twenty-one years old whom she was supporting until her arrest on the instant charges in 1974. The daughter subsequently had to resort to public assistance.

Prior to the events which gave rise to the instant charges, Ms. Carmona had never been convicted of a crime and had only once been arrested -- in 1956 -- when a dispute with a neighbor resulted in the arrest of all parties on assault charges which were ultimately dismissed.

(A. 44).

In 1974, Carmona was indicted on and pleaded guilty to both state and federal charges of cocaine possession. The federal sentence -- one year incarceration and three years special parole to run concurrently with the state sentence -- is not at issue in this proceeding.^{15/}

Martha Carmona was but marginally involved in drug trade. When she appeared before the United States District Court for sentencing on the federal charge, the court noted:

THE COURT: I would like to say with respect to the sentence imposed in the case that all of the evidence and the pre-sentence

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In 1974, Carmona was also charged in two State indictments with the sale of heroin but those charges were ultimately dismissed.

report before me indicate that this defendant was a small pusher of cocaine in small quantities; there does not seem to be any evidence of any large scale drug sales, even with respect to the state court conviction, as I see it.

United States v. Carmona, 74 Cr. 510, transcript of proceedings, March 26, 1976 at 4. Similarly, the first time she appeared in the federal court the Assistant United States Attorney referred to Carmona's state court conviction as follows:

Now, the sentence is Draconian. She is not by any stretch of the imagination a high-level narcotic trafficker, I don't believe, from what her record shows, and the individuals that worked on it, that being the Task Force...

Id., transcript of proceedings, September 29, 1975, at 8. With respect to her state court charges, Carmona tried but was unable to obtain the requisite prosecutor's recommendation for a sentence of lifetime probation. She was willing to provide assistance and "on several occasions indicated to police and prosecutorial officials that she wished to cooperate with them." However, the information she supplied the authorities was "already known to them and, therefore, of little utility" (A. 45-46).

Roberta Fowler is presently serving a sentence of four years to life for selling one dose (0.13 gram) of a substance containing cocaine, an A-III felony under the 1973 drug law. The court below found:

Ms. Fowler, now approximately twenty-three years old, had spent her entire life prior to her arrest in Albany and Sidney Center, New York. Her mother died while she was a teenager, and she received psychiatric counseling for some time thereafter. She completed eleven years of school and, while in prison, has since taken the high school equivalency examination. She has, for varying periods of time, been employed by the New York State Department of Labor, the Eden Park Nursing Home, and the New York Telephone Company. In 1969, she was married to Billie Fowler, and she now has two children who, during her incarceration, reside with her father in Albany. Since her imprisonment for the instant offense, she has apparently made diligent efforts to maintain close contact with her children. On her initiative, both nuns and guidance counselors from the day care center which her children attend have come to Bedford Hills to discuss the children's progress with her. The children have visited her relatively frequently.

The offense for which Ms. Fowler is incarcerated occurred on September 25, 1973. At trial, the Government established that, on that date, one James Werthmuller, an undercover agent, observed the petitioner at an Albany police station, asked her whether she could get him twenty dollars worth of cocaine, and then gave her twenty dollars. Ms. Fowler then left in a car with one Jerome Powell, a Government informer. Some twenty minutes later, the three individuals met again by pre-arrangement at a different location, at which point petitioner handed the substance containing cocaine to Powell, who, in turn, handed it to Werthmuller.

...At the time of sentence, Ms. Fowler, then twenty years of age, had no previous record of violent behavior or of criminal possession or sale of narcotics, although she was not a stranger to the criminal justice system.

The 1973 Drug Law

In September 1973, New York adopted a new law for the classification and punishment of offenses related to drugs. It amended the Penal Law to create three sub-categories of "A" felonies and included therein all sales of narcotics in any amount,^{16/} and possession of one or more ounces.^{17/} Each sub-category carries a different minimum term of incarceration, but for all three sub-categories, the law mandates a maximum sentence of life imprisonment. Thus, all convicted sellers of narcotic drugs, irrespective of the amount sold, must be sentenced to a maximum term of imprisonment for life. All persons convicted of possessing one or more ounces of narcotics must also receive a lifetime maximum.

The following chart sets forth the principal drug offenses classified as A felonies by the 1973 drug law.

^{16/}

Among the drugs classified as narcotic drugs under New York law are cocaine and heroin. Penal Law §220.00(7); Public Health Law §3306.

^{17/}

The 1973 drug law classifies offenses in terms of the number of ounces of narcotic possessed or sold. However, as detailed more fully at p. 23, *infra*, the drug law is keyed to the weight of the aggregate substance possessed or sold rather than the weight of the pure narcotic.

FELONY CATEGORY	CONDUCT	PENAL LAW PROVISION	MANDATORY MINIMUM	MANDATORY MAXIMUM
A-I	Sale of 1 ounce.	220.43	15 - 25 years	Life
	Possession of 2 oz.	220.21		
A-II	Sale of 1/8 oz.	220.41	6 - 8 $\frac{1}{3}$ years	Life
	Possession of 1 oz.	220.18		
A-III	Sale or	220.39	1 - 8 $\frac{1}{3}$ years	Life
	Possession with intent to sell of any amount	220.16		

The net effect of the 1973 reclassification was to increase radically the penalties imposed on persons convicted of drug offenses. For example, under the prior drug law as amended in 1969, the sale of up to eight ounces of cocaine was treated as a B felony, punishable by a maximum set at the discretion of the sentencing judge anywhere between three and twenty-five years.^{18/} Under the 1973 drug law, the sale of one-eighth ounce of cocaine is an A-II felony punishable by a mandatory maximum of life. Similarly, under prior law possession of any perceptible amount of cocaine with intent to sell it was a D felony, punishable by a maximum of between three and seven years, again at the discretion of the sentencing judge.^{19/} Possession of any amount with

^{18/} Penal Law §220.22, since repealed.

^{19/} Penal Law §220.15, since repealed.

intent to sell is now an A-III felony, carrying a mandatory maximum of life imprisonment. Under prior law, Martha Carmona and Roberta Fowler could have been sentenced to maximum sentences of as little as three years, and indeed could have been placed on probation without spending even one day in prison.^{20/}

The sweep of the A felony category is further expanded by the definitional provisions of the drug law. For example, "sale" is defined very broadly.^{21/} Even the gift of a flyspeck of cocaine is an A felony, as is an offer of a gift. Similarly, although bare possession is not an A felony unless one or more ounces is involved, the law uses an "aggregate weight" standard, so that determinations of amount are based on the combined weight of pure narcotic plus whatever inert substance it is diluted with. Thus, one who possesses an ounce of street-level cocaine cut several times so that it actually contains 1/10 ounce of narcotic and 9/10 ounce diluent is placed in the same A-II category as someone at the top of the distribution chain who possesses

^{20/}

Penal Law §§220.20 and 220.35, since repealed, and §§65.00 and 70.00(2).

^{21/}

New York Penal Law §220.00(1) provides:

"Sell" means to sell, exchange, give or dispose of to another, or to offer or agree to do the same.

an ounce of pure cocaine.

Once indicted on class A drug charges it is virtually impossible, short of acquittal or dismissal of all charges, for one to escape the law's mandatory sanctions.^{22/} Petitioners could not plea bargain out of the A felony category even though they might have had they been charged with murder, first degree arson, or kidnapping in the first degree.^{23/}

Once convicted, the only sentencing alternative to lifetime incarceration is lifetime probation. However, the only persons eligible for such probation are those who are able to provide material assistance to law enforcement officials and thereby obtain a favorable recommendation from the prosecutor.^{24/}

Once an individual charged with an A drug felony is convicted and sentenced, the only escape from actual

^{22/}

In fact as originally enacted, the 1973 drug law even resulted in the automatic denial of "youthful offender" treatment to youths (between 16 and 19) indicted as A drug felons. However, in 1975 New York Crim. Proc. Law §720.10(2) was amended to make eligible for "youthful offender" treatment youths indicted for A-III offenses. Teenagers with A-I or A-II indictments remain ineligible.

^{23/}

New York Criminal Procedure Law §220.10(6). The July 1976 amendment changes the law prospectively to permit persons charged with A-III felonies to plead down as far as a C felony. Criminal Procedure Law §220.10(5)(b). Persons charged with A-I and A-II felonies may plead to an A-III, but may plead no lower.

^{24/}

Penal Law §§65.00(1)(b), (3)(a)(ii).

imprisonment for life is release on parole. The decision respecting whether to release a given prisoner is reserved to the unfettered discretion of the New York State Board of Parole,^{25/} which historically has been exercised in a totally standardless and arbitrary manner.^{26/}

Ordinarily when a prisoner is released on parole, he or she remains under the custodial supervision of the Board until such time as it determines that the prisoner should be discharged from parole.^{27/} However, in enacting the 1973 drug law the legislature determined that no A drug felon should ever be discharged from parole.^{28/} In August of 1977, that provision was amended to permit drug offenders to be discharged on the same basis as other parolees.^{29/} Nevertheless, as long as they remain on parole, class A drug felons remain under the Damoclean threat of the drug law's harshest provision and are subject to reincarceration for life should they violate one of the myriad conditions of parole.^{30/}

^{25/} New York Correction Law §210.

^{26/} See pp. 70-72, infra.

^{27/} New York Correction Law §§212(6) and (8).

^{28/} Id.

^{29/} See fn. 11, supra.

^{30/} See pp. 74-75, infra.

ARGUMENT

Summary

The mandatory life sentences imposed upon Martha Carmona and Roberta Fowler for their offenses involving small amounts of cocaine are unconstitutional under the Cruel and Unusual Punishments Clause of the Eighth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment both because the sentences are grossly excessive and because the 1973 drug law under which they were imposed operates in a totally arbitrary manner.

As the court below held, petitioners' life sentences violate the rudimentary Eighth Amendment requirement that punishment be proportioned to offense. Despite the non-violent and petty nature of petitioners' offenses, New York has treated petitioners with greater severity than it does a person accused of any other felony, be it murder, kidnapping, or rape. No other jurisdiction in the United States would have subjected these petitioners to such extreme punishment.

Moreover, despite its extraordinarily harsh penalties, the 1973 drug law has demonstrably failed to serve any of the penological purposes which it was designed to fulfill: the law has had no effect on drug abuse or the rate of serious property crimes. Having provided no greater isolation or deterrence value than the old law, the harsh penalties of

the law are excessive and imposing them on petitioners violates both the Eighth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The Eighth Amendment also requires that a statutory scheme inflicting severe punishment select its subjects in a fair, rational, evenhanded manner. The 1973 drug law is again completely at odds with the Constitution. Through a number of factors in design and implementation, the law brings the same severe penalty down on a vast range of drug offenses, taking absolutely no cognizance of the wide variations in their seriousness. The law's parole and probation provisions offer relief from that penalty only in a wholly arbitrary, standardless fashion or as a reward to more serious offenders. In both its indiscriminate reach and its standardless reprieves, the 1973 drug law demonstrably fails the arbitrariness test embodied in the Eighth Amendment.

I. THE SENTENCES OF LIFE IMPRISONMENT IMPOSED UPON PETITIONERS CARMONA AND FOWLER VIOLATE THE EIGHTH AMENDMENT IN THAT THEY ARE GROSSLY EXCESSIVE

In Coker v. Georgia, 97 S.Ct. 2861, 2865 (1977), the Supreme Court set out alternative grounds upon which a punishment is to be judged excessive:

...if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground.

The district court here reached its determination under the second leg of the Coker test by finding that the sentences imposed upon petitioners were "so disproportionately severe in relation to the gravity of the offenses charged as to constitute cruel and unusual punishment" (A. 43). Judged by either standard, however, the sentences of life imprisonment imposed upon petitioners are grossly excessive.^{31/}

^{31/}

It is clearly established that in analyzing whether the penalty imposed upon petitioners is unconstitutional, it is the maximum sentence that must be considered. For, while persons serving life sentences may be paroled before the expiration of their maximum terms of imprisonment, such parole is within the absolute discretion of the Parole Board. Menechino v. Oswald, 430 F.2d 402, 408 (2d Cir. 1970), cert. denied, 400 U.S. 1023 (1971) ("nothing in the state court's sentence, or in state statutes or rules, entitles [petitioners] to [parole], whether it be labeled a 'right' or a 'privilege.' [Petitioners are] entitled only to be released after full service of [their] sentencesThe [Parole] Board is given absolute and exclusive discretion to decide whether or not to initiate parole release proceedings and, if so, whether parole should be granted to [petitioners]. [Petitioners] have been constitutionally deprived of [their] right to liberty for the period of [their] sentence[s].") See also, New York Correction Law §213; Trop v. Dulles, 356 U.S. 88, 102 (1958) (footnotes omitted) ("It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.") In this case, even should petitioners be granted parole, they would be subject to reincarceration for life should they violate any of the conditions of their parole. See discussion of those conditions infra at pp. 74-75. Over 40% of persons paroled in New York State are returned to prison subsequent to release to parole supervision. New York State Department of Correctional Services, Annual Statistical Report 1974 Data (Inmate and Parole Populations), A. 169-70. See also, In re Foss, 519 P.2d 1073 (Cal. 1974) (en banc); In re Lynch, 503 P.2d 921, 925 (Cal. 1972) (en banc) ("Viewed realistically, a defendant's liability is to serve the maximum term, and he is therefore entitled to know that the maximum in his case is lawful."); Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. denied, 415 U.S. 938, 983 (1974). The New York Court of Appeals in its decision on the 1973 drug

(footnote continued)

A. The Sentences of Life Imprisonment Imposed Upon Petitioners Carmona and Fowler are Clearly Disproportionate

The requirement that punishment should be proportionate to the offense committed is well-settled Eighth Amendment doctrine. As long ago as 1892, Mr. Justice Field declared that the Cruel and Unusual Punishments Clause extended not only to torture but also to "all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged," O'Neil v. Vermont, 144 U.S. 323, 339 (1892) (dissenting opinion). Two decades later, the Supreme Court adopted this view and held that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense," Weems v. United States, 217 U.S. 349, 367 (1910). And just recently the Court struck down a sentence on disproportionality grounds. Coker v. Georgia, 97 S.Ct. 2861 (1977).^{32/} While the punishment at issue in Coker was the death penalty, courts have

(footnote continued)
law, explicitly accepted this principle: "In considering punishments the maximums must be examined, whether they be for long or lifetime imprisonment....[citing In re Lynch, supra]," People v. Broadie, 37 N.Y. 2d 100, 111, 371 N.Y.S. 2d 471, 475, 332 N.E. 2d 338, cert. denied, 423 U.S. 950 (1975). Thus, decisions upholding mandatory minimum sentences of varying lengths cited by respondents (Brief at 29-30) are inapposite.

^{32/}

Proportionality is purportedly a guiding principle of New York penal law. See, N.Y. Penal Law §1.05(4): "The general purposes of the provisions of this chapter are: ...4. To differentiate on reasonable grounds between serious and minor offenses and to prescribe proportionate penalties therefor...."

not hesitated to strike down as disproportionate punishments which involved terms of imprisonment. See, e.g., Weems v. United States, 217 U.S. at 377 ("It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment."); Downey v. Perini, 518 F.2d 1288 (6th Cir.), vac. on other grounds, 423 U.S. 993 (1975) (sentence of 30 to 60 years for possession and sale of marijuana held unconstitutional); United States v. McKinney, 427 F.2d 449 (6th Cir. 1970), cert. denied, 402 U.S. 982 (1971) (five year prison sentence for refusing to submit to induction held excessive in view of defendant's prior record); In re Foss, 519 P.2d 1073 (Cal. 1974) (en banc) (life sentence for drug offense); In re Lynch, 503 P.2d 921 (Cal. 1972) (en banc) (life sentence for second offense of indecent exposure).

Over the years, the courts have developed several objective tests^{33/} by which to measure whether a punishment is proportionate to an offense: (1) an examination of the nature of the offense and the offender; (2) a comparison of the challenged penalty to penalties imposed in the same jurisdiction for more serious offenses; and (3) a comparison

33/

The Court in Coker stressed the importance of objective criteria:

Furthermore, these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent.

97 S.Ct. at 2865-66.

of the challenged penalty to penalties imposed in other jurisdictions for the same offense.^{34/}

1. The life sentences were imposed upon petitioners without regard to the nature of the offenders or their offenses.

The initial element to be examined is the nature of the offense itself. The case at bar involves a conviction for possession of one aggregate ounce of cocaine and a conviction for sale of 0.13 gram (.00455 ounce) of cocaine. Neither Martha Carmona nor Roberta Fowler has been accused of a crime of violence.^{35/} Neither is a hardened criminal.

However the courts which sentenced these two women to life terms were not permitted to take into consideration either the nature of their offenses or their individual characters. The fact that petitioners were not major drug

^{34/} E.g., Coker v. Georgia, 97 S. Ct. 2861 (1977); Trop v. Dulles, 356 U.S. 86 (1958), Weems v. United States, 217 U.S. 349 (1910); Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. denied, 415 U.S. 938, 983 (1974); Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970), cert. denied, 408 U.S. 942 (1972); In re Foss, 519 P.2d 1073 (Cal. 1974) (en banc); In re Lynch, 503 P.2d 921 (Cal. 1972) (en banc).

^{35/} The non-violent nature of the offense has been considered of prime importance in judging proportionality. E.g., Hart v. Coiner, supra; In re Foss, supra; In re Lynch, supra. In cases involving violent offenses, the degree of violence or harm to the victim has been considered important. E.g., Ralph v. Warden, supra; Coker v. Georgia, supra.

traffickers, the fact that petitioners' prior records revealed that they were not hardened offenders, the fact that one of the petitioners had an addiction history, the fact that both petitioners had on-going relationships with family members who depended upon them for financial or emotional support, none of these facts could be taken into account in sentencing. These petitioners were sentenced to life imprisonment because the New York State Legislature, in an excess of zeal, provided for mandatory life sentences for an extraordinarily wide range of drug offenders, purposely excluding any possibility that character or culpability could be considered in determining sentence, and at the same time excluding any possibility that the punishment would be proportionate to the actual offense committed. Petitioners and their offenses are simply not so despicable as to condemn them to a sentence of imprisonment for life. Indeed, even if everything the State says of petitioners and their offenses were true, they would not be deserving of life imprisonment.

Life imprisonment is the penultimate punishment. Tradition, custom, and common sense reserve it for those violent persons who are dangerous to others. It is not a practical solution to petty crime in America. Aside from the proportionality principle, there aren't enough prisons in America to hold all the Harts that afflict us.

Hart v. Coiner, 483 F.2d 136, 141 (4th Cir. 1973), cert. denied, 415 U.S. 938, 983 (1974).

2. New York punishes more serious crimes much less severely.

The conclusion that the mandatory life sentences imposed upon petitioners are disproportionate to the offenses they committed is supported by application of the second objective test--a comparison of their punishment with the penalties New York imposes for far more serious crimes.^{36/} For the law under which Carmona and Fowler were convicted and sentenced treated them with greater severity than New York law accords to any other person accused of a felony.

In New York State, all class A felony offenders receive a mandatory maximum life sentence.^{37/} Thus, all persons convicted of class A drug offenses must receive a sentence of life imprisonment--the same penalty that New York has reserved for a small group of society's most heinous

^{36/}

The rationale underlying comparison of punishments imposed by the same jurisdiction for other, more serious, crimes is "that although isolated excessive penalties may occasionally be enacted, e.g., through honest zeal [citing Weems v. United States] generated in response to transitory public emotion, the Legislature may be depended upon to act with due and deliberate regard for constitutional restraints in prescribing the vast majority of punishments set forth in [state] statutes." In re Lynch, 503 P.2d at 931-32.

^{37/}

The only capital crime in New York is murder in the first degree (P.L. §125.27: murder of a police or correction officer or murder committed by person serving a life sentence). The New York Court of Appeals has reviewed a portion of the sentencing provision for first degree murder (P.L. §60.06) and declared it unconstitutional because of its mandatory nature. People v. Davis, N.Y.L.J. Nov. 16, 1977 at 4, col. 2.

crimes: second degree murder (premeditated murder, felony murder and extremely reckless or depraved killing),^{38/} first degree arson (intentionally damaging a building by explosion when another person is within),^{39/} and first degree kidnapping (abduction for purposes of any type of extortion or abduction where the victim dies).^{40/}

Class B felonies, offenses such as first degree rape (sexual intercourse by forcible compulsion or with a female who is physically helpless or less than eleven years old),^{41/} first degree manslaughter (homicide with intent to cause serious physical injury or intentional homicide by one under extreme emotional disturbance),^{42/} second degree kidnapping (abduction),^{43/} second degree arson (intentionally damaging a building by fire when a person is within),^{44/}

^{38/} N.Y. Penal Law §125.25. This is the traditional New York first degree murder statute. Descriptions provided in parentheses are sometimes incomplete.

^{39/} N.Y. Penal Law §150.20.

^{40/} N.Y. Penal Law §135.25.

^{41/} N.Y. Penal Law §130.35.

^{42/} N.Y. Penal Law §125.20.

^{43/} N.Y. Penal Law §135.20.

^{44/} N.Y. Penal Law §150.15.

first degree robbery (forcible stealing by a person carrying, displaying or threatening to use a weapon or accompanied by serious physical injury to the victim),^{45/} and first degree burglary (knowingly entering or remaining unlawfully in a dwelling at night with intent to commit a crime by a person carrying, displaying or threatening to use a weapon or accompanied by physical injury to the victim),^{46/} carry a discretionary maximum term of up to 25 years.^{47/}

Class C felonies, punishable by a discretionary prison term of up to 15 years or in some instances by conditional or unconditional discharge or probation, include such offenses as assault in the first degree (intentionally causing serious injury to another with a deadly weapon, intentionally disfiguring or disabling a person or causing serious physical injury to a victim or bystander during the commission of a felony),^{48/} burglary in the second degree (unlawfully

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N.Y. Penal Law §160.15.

^{46/}

N.Y. Penal Law §140.30.

^{47/}

In other words, the sentencing court can impose a maximum sentence of anywhere between three and twenty-five years and may impose a minimum term of no greater than one-third the maximum. N.Y. Penal Law §70.00(2)(b) and 70.00(3)(b).

The attempt to commit a class B felony is a C felony. N.Y. Penal Law §110.05(5). Persons charged with class B felonies may plead to a lesser felony.

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N.Y. Penal Law §120.10.

entering or remaining in a building armed with explosives or a deadly weapon or causing physical injury to a victim or bystander during the commission of the crime),^{49/} criminal facilitation in the first degree (knowingly aiding a person who intends to commit a class A felony),^{50/} grand larceny in the first degree (stealing property by extortion),^{51/} and robbery in the second degree (forcibly stealing while aided by another or causing injury to the victim or a bystander).^{52/}

Nor does this comparison of the punishment accorded drug offenders with that accorded admittedly violent and dangerous offenders tell the entire story. For at the time petitioners were convicted, New York law permitted an accused in any non-drug A felony case to plead to a B or lesser felony carrying no mandatory life term--and perhaps no term of imprisonment at all--but the law prohibited such a plea in any A drug felony case.^{53/} Finally, since all heroin and cocaine possession offenses involving an ounce

^{49/} N.Y. Penal Law §140.25.

^{50/} N.Y. Penal Law §115.05.

^{51/} N.Y. Penal Law §155.40.

^{52/} N.Y. Penal Law §160.10.

^{53/} See p. 25, supra.

or more aggregate weight^{54/} and all sale offenses^{55/} were made class A felonies, the mandatory life sentence came to be applied to an extraordinarily broad range of offenders without regard to their involvement or their degree of culpability.

In comparing the punishment mandated for drug offenses with that prescribed for other crimes this Court must ask whether it is rational to believe that the possession of an ounce of cocaine or the sale of \$20 worth of cocaine are more dangerous or serious offenses than the rape of a ten year old, the burning down of a building occupied by people, or the killing of another human being while intending to cause him serious injury. Does it offend the constitutional principle of proportionality for petitioners Carmona and Fowler to have been sentenced under a mandatory statute to life imprisonment while offenders who commit grossly more serious crimes may be sentenced to lesser terms, or probation, in the discretion of the sentencing court?

The State does not deny the disparity between the punishments mandated for drug offenses and those permitted for other, violent crimes. Rather, the State has

^{54/}

See discussion of aggregate weight supra at p. 23 and infra at pp. 61-62.

^{55/}

See footnote 21, supra.

attempted to justify the clear disparity produced by the law with the argument that drugs are infinitely dangerous to our society, that the drug traffic is responsible for violent collateral crimes, and that therefore anyone who possesses or sells these instruments of destruction must be severely punished.

Of course, one difficulty with the State's argument is that it proves too much. Petitioners do not suggest that there is not a serious problem of drug abuse in this country. Nor do they suggest that severe punishment might not be appropriate. The issue in this case, however, is how severe. Can the State, when it discovers that life terms do not suffice to stop drug abuse,^{56/} institute the death penalty for the sale of \$20 worth of cocaine? The question is not whether drug possession and sale may be punished, but whether the punishment imposed by New York State is excessive. Invocations of the police power provide no benchmark for answering that question.

Moreover, on its own terms, the State's argument contradicts itself. For viewed realistically, that argument appears to countenance more severe punishment for an act which may lead to the commission of violent crime than it would for the actual commission of the violent crime itself.

^{56/}

See discussion, infra, at Point I.B.

In concrete terms, when the State argues that drug abuse leads to collateral crimes, the crimes that are really at issue are robbery and burglary--crimes to obtain funds to purchase drugs.^{57/} Yet the State has seen fit to provide for a discretionary maximum prison term of from three to twenty-five years for both robbery in the first degree and burglary in the first degree, and to permit persons charged with those felonies to plead to lesser charges for which probation is considered appropriate punishment.

Acceptance of the State's rationale for the extraordinary punishments inflicted on petitioners in this case would turn the proportionality principle on its head. Would it, for example, be rational for the State to punish drunken driving more seriously than vehicular homicide on the theory that drunken driving under certain conditions might lead to the death of a pedestrian? It is no more rational for the State to punish the possession or sale of cocaine more severely than robbery and burglary on the theory that under certain circumstances possession or sale of drugs may lead to robbery or burglary. Clearly, whether a punishment is proportional to an offense must be measured in relation to the actual offense committed and not to what

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Even if the crime of murder is taken into consideration as a possible collateral crime, it is clear after Coker that the state may not constitutionally punish an offense which may be accompanied by murder as though it were always accompanied by murder. See Coker v. Georgia, 97 S.Ct. at 2869.

might have occurred. The Supreme Court only recently highlighted this very principle in declaring the death penalty for rape unconstitutional under the proportionality test:

Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not.

Coker v. Georgia, 97 S.Ct. at 2869 (footnote omitted).^{58/}

If the inherent, immediate threat of injury or death in rape cases may not be considered in judging the constitutionality of a punishment for that offense, surely the more speculative collateral consequences of drug offenses can form no part of a justification for the life sentences imposed upon petitioners.

The sentences of life imprisonment inflicted upon the petitioners in this case are clearly grossly disproportionate when compared to the punishments prescribed for other crimes in this State.

^{58/}

See also Ralph v. Warden, 438 F.2d at 794 (opinion of Haynsworth, J. denying rehearing en banc):

[T]he nature, degree and duration of the harm have long been recognized as important criteria in determining the appropriateness of punishment. The difference between murder and attempted murder is a fortuitous accident without relevance to the assailant's moral culpability, but in every jurisdiction which retains capital punishment for murder, the survival of the victim avoids all possibility of imposition of the death penalty.

3. New York's punishment for petitioners' crimes is more severe than the punishment that would be imposed by any other state.

The sentences of life imprisonment which were imposed upon petitioners are substantially more severe than the punishment they would have received had they been convicted anywhere else in this country.^{59/}

No other jurisdiction in the United States prescribes a mandatory life sentence for sale of one ounce or less of cocaine. In fact, only six states have statutes which even permit the court to consider imposition of a life sentence on a first (felony) offender. The most common maximum permitted is between ten and twenty years, with eleven states providing for maximum terms of up to 10 years, thirteen states allowing maximum terms of up to 15 years and ten states permitting maximum sentences of up to 20 years; none of these states requires imposition of such a maximum term. The sentencing laws of New York's sister states are represented below in chart form:

^{59/}

The rationale underlying an examination of punishments imposed by other jurisdictions for the same offense is that such a comparison will reveal the values and standards of society.

[T]he assumption is that the vast majority of...jurisdictions will have prescribed punishments for this offense that are within the constitutional limit of severity; and if the challenged penalty is found to exceed the punishments decreed for the offense in a significant number of those jurisdictions, the disparity is a further measure of its excessiveness.

In re Lynch, 503 P.2d at 932.

Maximum term for sale of an ounce or less of cocaine (years)

5	10	15	20	more than 20	life
Ark.	Alsk.	Ala.	Colo.	Del.	Ariz.
Cal.	Hawi.	Conn.	Ill.	Ga.	Idaho
Vt.	Iowa	Fla.	Kans.	Ind.	Mo.
	Ky.	Minn.	Maine	La.	Mont.
	Mass.	Miss.	Md.	N.Mex.	R.I.
	Neb.	N.H.	Mich.	Virg.	Tex.(99)
	N.Car.	N.J.(12)	Nev.		
	Oreg.	Ohio	N.Dak.		
	S.Dak.	Penn.	Okla.		
	Tenn.	S.Car.	Wyo.		
	Wash.	Utah			
		W.Virg.			
		Wisc.			

Thus in no state in this nation other than New York would Roberta Fowler have faced a mandatory life sentence for her 0.13 gram, \$20 cocaine sale.^{60/}

As for petitioner Carmona who was convicted of possession of an ounce of cocaine, she would not have faced a sentence of life imprisonment under the law of any other state. For no state other than New York even permits the court to consider imposition of a life sentence on a first offender for possession of an ounce of cocaine.^{61/} In fact, in 31 states in this country, the maximum penalty provided by law for possession of an ounce of cocaine is less than

^{60/}

The federal penalty for sale or possession with intent to sell is a term of up to 15 years for the first offender. 21 U.S.C. §841.

^{61/}

Only two states have a possible maximum sentence of life for a second offender, and four states have a possible maximum sentence of life for a third offender.

the minimum sentence Martha Carmona is serving:

Maximum term for possession of an ounce or more of cocaine (years)

less than 5	5	10	15	20
Cal.	Ark.	Alsk.	Ala.	Kans.
Idaho	Del.	Ariz.	Colo.	Maine
Iowa	Fla.	Conn.(7)	Ga.	Mo.
Md.	Hawi.	Ill.		Tex.
Mass.	Ky.	Ind.(8)		
Mich.	La.	Nev.(6)		
Miss.	Minn.	N.H.(7)		
Neb.	Mont.	N.J.(7)		
Penn.	N.Mex.	Okla.		
R.I.	N.Car.	Oreg.		
S.Car.	N.Dak.	Virg.		
Tenn.	Ohio			
Utah	S.Dak.			
Vt.	Wash.			
W.Virg.				
Wisc.				
Wyo.				

In no state in this nation other than New York would Martha Carmona be serving a life sentence for possession of an ounce of cocaine.^{62/}

62/

The federal penalty for possession of cocaine for a first offender is either conditional discharge or a maximum term of one year. A second offender may be sentenced up to two years. 21 U.S.C. §841.

The only instance in which a life sentence is authorized under the federal drug laws is where a defendant is convicted of engaging in a "continuing criminal enterprise," 21 U.S.C. §848. In order to be found guilty of such an offense, a defendant must have committed a drug felony offense which was part of a continuing series of such offenses, undertaken by the defendant "in concert with five or more other persons with respect to whom [the defendant] occupies a position of organizer, a supervisory position, or any other position of management, and...from which [the defendant] obtains substantial income or resources." 21 U.S.C. §848(b). The life sentence authorized by 21 U.S.C. §848(a) is not mandatory.

As the court below found, the degree of severity with which New York treated petitioners' offenses truly "is...virtually unique among all the States of the Union" (A. 63).^{63/}

When a severe punishment is not inflicted elsewhere or when more serious crimes are punished less severely, there is a strong inference that the state is exercising arbitrary, "unrestrained power." [Citing Weems v. United States.]

Furman v. Georgia, 408 U.S. 238, 275 n.18 (Brennan, J. concurring). In the face of the unanimous judgment of New York's sister states and of the federal government that the possession and sale of cocaine can be adequately controlled by penalties substantially less than life imprisonment, New York's imposition of a mandatory sentence of life imprisonment on petitioners Carmona and Fowler is clearly excessive.^{64/}

^{63/} This finding was concurred in by the New York Court of Appeals. People v. Broadie, 37 N.Y. 2d at 116.

^{64/} The laws of New York's sister states with respect to narcotics sale and possession are as follows:

Alabama	22 Code of Ala. §258(25) - §258(60)
Alaska	AS 17.10.010 - 17.10.240
Arizona	A.R.S. §§36-1001 - 36-10024
Arkansas	Ark. Stat. §§82-1001 - 82-2638
California	West's Ann. Health & Safety Code §§11350 - 11651; Penal Law §18
Colorado	C.R.S. 1973, §§12-22-301 et seq.
Connecticut	C.G.S.A. §§19-443 - 19-504
Delaware	16 Del. C. §§4701 - 4778
Florida	F.S.A. §§893.01 - 893.15
Georgia	Code, §§79A-801 - 97A-822
Hawaii	HRS §§329-1 - 329-58

(footnote continued)

B. The Mandatory Life Sentences Imposed on Petitioners Carmona and Fowler Are Excessive in That They Serve No Penological Purpose and Therefore Needlessly Inflict Pain and Suffering

In order to hold petitioners' sentences unconstitutional-ly excessive, this Court need not reach the issue whether the extraordinarily harsh sentences imposed upon

(footnote continued)

Idaho	I.C. §§37-2701 - 37-2751
Illinois	S.H.A. ch. 56 1/2, §§1100 - 1603
Indiana	ISA §§35-48-1-1 - 35-48-14
Iowa	I.C.A. §§204.101 - 204.602
Kansas	K.S.A. §§65-4101 - 65-4140, 21-4501
Kentucky	K.R.S. §§218A.101 - 218A.990
Louisiana	LSA-R.S. §§40-961 - 40-995
Maine	22 M.R.S.A. §§2361 - 2380
Maryland	Code 1957 Art. 27 §§276 - 302
Massachusetts	M.G.L.A. c94C, §§1 - 48
Michigan	M.C.L.A. §§335.301 - 335.367
Minnesota	M.S.A. 152.01 - 152.20
Mississippi	Code 1972 §§41-29-101 - 41-29-175
Missouri	V.A.M.S. §§195.010 - 195.320
Montana	R.C.M. §§54-301 - 54-327
Nebraska	R.S. Supp. 1972 §§28-4,115 - 28-4,142
Nevada	N.R.S. 453.001 - 453.361
New Hampshire	R.S.A. 318-B:26
New Jersey	N.J.S.A. §24:21-19
New Mexico	1953 Comp. §§54-11-1 - 54-11-39
North Carolina	G.S. §§90-86 - 90-113.8
North Dakota	NDCC §19-03.1-01 - 19-03.1-43
Ohio	R.C. §§2925.01 - 2925.51
Oklahoma	63 Okl.St.Ann. §§2-101 - 2-610
Oregon	ORS 167.202 - 167.252
Pennsylvania	35 P.S. §§780-101 - 780-144
Rhode Island	Gen.Laws 1956 §§21-28-1 - 21-28-68
South Carolina	Code 1976 §§44-53-110 - 44-53-580
South Dakota	SDCL 39-17-34 - 39-17-155
Tennessee	T.C.A. §§52-1408 - 52-1450
Texas	Vernon's Ann.Civ.St.Art. 4476.15
Utah	U.C.A. 1953, §§58-37-1 - 58-37-19
Vermont	Ver.Stats.Ann. 18 §§4201 - 4255
Virginia	Code 1950, §§18.2-247 - 18.2-265, 18.2-10
Washington	RCWA 69.50.101 - 69.50.608
West Virginia	Code, 60A-1-101 - 60A-6-605
Wisconsin	W.S.A. 161.001 - 161.62
Wyoming	W.S. 1957, §§35-347.1 - 35-347.55

petitioners Carmona and Fowler serve any penological purpose Coker v. Georgia, 97 S.Ct. 2861 (1977).^{65/} However, the 1973 drug law has also failed this alternative Eighth Amendment standard.

This case is unique in that this Court has the opportunity, in determining whether the mandatory life sentence serves any penological purpose, to draw upon findings made by a neutral body which conducted a professional study designed to test the effectiveness of the operation of the 1973 drug law.^{66/} After the 1973 drug law was enacted, the Association of The Bar of The City of New York and the Drug Abuse Council jointly organized a Committee and Drug Law Evaluation Project to collect data about the new drug law and to evaluate its workings and effectiveness. The director of the Drug Law Evaluation Project, Anthony F. Japha, testified at the hearing below (A. 111-128), and the "Interim Report" of the Project's Staff was introduced into evidence (Ps' exhibit 3, A. 171-215).^{67/} After the hearing was completed, the

^{65/}

If a sentence is disproportionate to the crime committed by the offender, "it is cruel and unusual punishment within the meaning of the Eighth Amendment even though it may measurably serve the legitimate ends of punishment...." Coker v. Georgia, 97 S. Ct. at 2866 n. 4.

^{66/}

This study had not been published when the New York Court of Appeals decided People v. Broadie, supra.

^{67/}

The full title of the Interim Report was The Effects of the 1973 Drug Laws on the New York State Courts.

Joint Committee published the final report of the results of its study: Association of The Bar of The City of New York/Drug Abuse Council, Inc., The Nation's Toughest Drug Law: Evaluating the New York Experience (Final Report of the Joint Committee on New York Drug Law Evaluation), 1977 [hereinafter "Final Report"].

The 1973 drug law was supposed to serve the purposes of isolation and deterrence through the swift and certain imposition of extraordinarily harsh penalties, including the mandatory life sentences imposed upon persons such as petitioners.

The new drug law of 1973 had two principal objectives. First, it sought to frighten drug users out of their habit and drug dealers out of their trade, and thus to reduce illegal drug use, or at least contain its spread. Second, it aimed to reduce crimes commonly associated with addiction, particularly robberies, burglaries, and theft.

Final Report at 3.^{68/} Thus, "the ultimate success [of the law has] to be judged on what happens to crime and drug abuse." (Testimony of Anthony Japha, Tr. at 71). See also, Interim Report, A. 172-73, 174. The study was designed by the Joint Committee to evaluate the effect of the law on drug abuse and serious property crimes.

^{68/}

In People v. Broadie, 37 N.Y. 2d 100, 114 (1975), the New York Court of Appeals similarly found that the two penological purposes of the drug law were isolation and deterrence. The Court specifically rejected retribution as a basis for criminal penalties generally and as a basis for the drug law in particular and made clear that the law was not designed to further rehabilitation.

The 1973 law had no effect on drug abuse. The Drug Law Evaluation Project concluded that "heroin use in New York City had not been reduced as a consequence of the 1973 drug law," Final Report at 35. "Heroin use was as widespread [in New York City] in mid-1976 as it had been when the 1973 revision took effect, and ample supplies of the drug were available," Id. at 7.^{69/}

Nor, the study found, could the drug law be credited with producing this apparent stability in the drug abuse picture. The Project gathered data to determine whether the new drug law had been effective in preventing an increase in the growth of drug abuse. Examination of data from other eastern seaboard cities and states with drug abuse problems

^{69/}

The conclusion that narcotic drug abuse did not decline was based upon a variety of data sources. In view of the fact that the illegal nature of heroin renders direct measurement of its use impossible, the two most reliable indicators of heroin use are considered to be statistics reflecting the level of narcotics deaths and the level of serum hepatitis cases. The Project's study revealed that there was not a significant decline in these two indicators between the period 1970 to mid-1973 and the period mid-1973 to mid-1976. See Final Report at 33. The conclusion that drug abuse was not affected by the new law was also supported by data gathered through interviews with drug treatment and police officials. "Most [drug treatment and police officials in New York City] doubted that the law had a long term effect on the extent of heroin use or drug dealing. The prevailing opinion was that heroin use remained widespread throughout the period the law was in effect." Id. at 37. For example, there was a stable number of admissions into drug treatment between 1973 and 1976 "which suggests a stable pool of users from which the clinics drew their clients." Id. In addition, the price and supply of heroin remained stable. Id. at 40-41. For a complete description of the data and research methodology relied upon by the Project, see Final Report 33-35, 41-53, 55-57, 59-63.

showed that the law had not had any effect on the pattern of drug abuse:

The pattern of stable heroin use between 1973 and mid-1976 was not appreciably different from the average pattern of other East Coast cities.

There is no indication that heroin use was brought under control in New York any better than it was elsewhere.

Id. at 41, 43-44.^{70/}

The drug law also failed to fulfill its other purpose: the new law did not stem the tide of serious property crime.

[I]f the 1973 law had exerted a persistent restraint on serious property crimes, the offenses most often associated with heroin users, these crimes should have increased more slowly in New York than in nearby states. Instead, as measured by the FBI, the rate at which felonious property crimes increased in New York was virtually identical to the average increase in Maryland, Pennsylvania, and New Jersey, three nearby states where the 1973 law was not a factor. [Moreover,] [t]he rate of increase in these crimes [had been] somewhat lower in New York than in the other states during the years immediately preceding introduction of the new law.

....
In fact,...in the post-law years, New York City experienced a more rapid increase [in serious property crimes] than the comparison cities did.

^{70/}

These conclusions were supported by other facts uncovered by the Project. For example, examination of records of hospital emergency rooms and other data revealed that there was a rise in the use of non-narcotic illegal drugs, "suggesting that the 1973 drug law did not effectively curb" such abuse. Id. at 56. Similar increases were noted in other East Coast cities.

The rapid growth of felonious property crimes in New York State and the similarity between New York and the other states suggest that the 1973 law did not have the desired effect of reducing drug-related crime in New York State."

Id. at 59, 61.

The Drug Law Evaluation Project concluded that the 1973 drug law simply failed to serve either penological purpose for which it was designed.

Data assembled by the Project revealed the reasons for the law's failure. While a convicted offender faced an increased risk of incarceration because of the law's mandatory penalties, this increase "was largely offset by [the] other changes which occurred in the adjudication process." Id. at 87.

Although drug arrests remained constant,^{71/} "[t]he proportion of drug felony arrests that resulted in an indictment declined steadily after the 1973 drug law took effect." Id. at 93. Moreover,

[e]ven out of the smaller number of indictments, there was a decline under the 1973 law in the rate at which convictions were obtained in drug cases in superior court [courts with felony jurisdiction]. In 1972, about 86% of the State's drug indictments resulted in conviction. By 1976, this figure had fallen to 79%.

....
The total number of drug convictions obtained in New York State superior courts fell by almost half between 1972 and 1975.

^{71/}

Id. at 89.

Id. at 95, 96 (emphasis added).^{72/} These factors prevented any increase in the threat of punishment to those who violated the drug law:

The net result was that the risk of incarceration facing persons arrested for a new law drug felony remained substantially unchanged from the risk they had faced under the old law. In 1972 about 11% of felony drug arrests resulted in a prison or jail sentence in superior court; in early 1976, the proportion was...identical.

....

Drug traffickers as a group were not likely to see the new law as a serious threat.

Id. at 87, 16.^{73/} In other words, despite its extraordinarily harsh mandatory penalties, the new law has provided no greater isolation or deterrence value than the old law with its more flexible and reasonable penalty structure.

^{72/}

"There was no comparable decline in the conviction rate in non-drug felony cases during this period." Id. at 95. The decline in the conviction rate for drug felonies was attributed primarily to an increased rate of dismissals: "Dismissals in drug cases in New York City rose from 6.8% of dispositions in 1972 to over 20% in 1975." Id. while the rate of dismissals has declined somewhat since 1975, in 1976 when the study was terminated it was still more than twice the 1972 rate. Id.

Moreover, the overall disposition rate decreased. "As a result of delays in processing new law cases, fewer drug indictments were disposed of under the new law than would have been expected during a similar period of time under the old law. During 1972, for example, the New York State courts were able to dispose of 93% of all new drug indictments. Between January 1974 and June 1976, the courts disposed of only 62% of the...indictments brought under the new drug law." Id. at 108 (footnote omitted).

^{73/}

These conclusions in the Final Report echoed findings made in the Interim Report:

"The rise in the frequency of prison sentences in 1975 was not enough to make a significant difference in the risk of prison facing offenders committing drug crimes. That
(footnote continued)

If ever a penal law has demonstrably failed to fulfill its purposes, it surely is this one. The life sentences imposed upon petitioners Carmona and Fowler serve no purpose other than the forbidden one of inflicting needless pain:

a punishment is "excessive" and unconstitutional if it...makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering....

Coker v. Georgia, 97 S. Ct. at 2865. The sentences before this Court are clearly unconstitutional under this standard.^{74/}

(footnote continued)

risk is still less than one chance in a hundred of receiving a prison sentence from a superior court." Interim Report, A. 178. See also, Id. at A. 175, 180 ("Implementation of the 1973 drug laws had not resulted in a measurable increase in the likelihood of punishment for either drug or non-drug offenses by mid-1975.")

The Director of the Project gave similar testimony at the trial below. See A. 125. See also Interim Report, A. 181, 190.

Moreover, even "[i]f indictment and conviction rates had not fallen,...the rise in the ratio of incarceration to conviction that did occur would have increased an arrestee's risk of incarceration from 11% to 18%. That was the maximum effect on risk which the mandatory sentencing provision could have provided. It is impossible to say whether an increase of that magnitude would have generated a perceived threat great enough to deter any potential offenders from illegal drug trafficking..." Final Report at 16.

^{74/}

See also, Gregg v. Georgia, 96 S. Ct. 2909, 2929-30 (1976) ("so totally without penological justification that it results in the gratuitous infliction of suffering"); Furman v. Georgia, 408 U.S. 238, 279 (1972) (Brennan, J., concurring) ("If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted...the punishment inflicted is unnecessary and therefore excessive"); Trop v. Dulles, 356 U.S. 88, 105

(footnote continued)

To the extent that the mandatory life sentence provisions of the 1973 drug laws serve no penological purpose, they also deny petitioners due process and equal protection of the laws. The power of the State to define crimes and establish punishments is limited by the requirement that statutory classifications and distinctions must rationally further some "legitimate, articulated state purpose." McGinnis v. Royster, 410 U.S. 263, 270 (1973). The Supreme Court has readily struck down legislative schemes and criminal sanctions that fall short of this Constitutional mandate. See, e.g., Jackson v. Indiana, 406 U.S. 715, 729-30, 738 (1972); Baxstrom v. Herold, 383 U.S. 107, 111-12 (1966). See also, United States ex rel. Sero v. Preiser, 506 F.2d 1115 (2d Cir. 1974), cert. denied, 421 U.S. 921 (1975); Pugh v. Rainwater, 483 F.2d 778, 789-90 (5th Cir.), cert. denied, 414 U.S. 1077 (1973).

Thus, the 1973 drug law not only runs afoul of the Cruel and Unusual Punishment Clause in its failure to accomplish its penological goals; it also deprives petitioners of due process and equal protection in that it does not rationally further any legitimate, articulated state purpose.

(footnote continued)

(1958) (Brennan, J., concurring); Weems v. United States, 217 U.S. 349, 381 (1910); Hart v. Coiner, 483 F.2d 136, 141 (4th Cir. 1973) ("We think that a sentence of life imprisonment, the most severe punishment available under West Virginia law, is unnecessary to accomplish the legislative purpose to protect society from an individual who has committed three wholly nonviolent crimes over a period of twenty years. Nor, except on the theory that more is better, is it necessary to deter others.").

- II. NEW YORK DESIGNED AND IMPLEMENTED THE 1973 DRUG LAW SO ARBITRARILY AND IRRATIONALLY THAT PETITIONERS' MANDATORY LIFE SENTENCES CONTRAVENE THE REQUIREMENT OF THE EIGHTH AND FOURTEENTH AMENDMENTS THAT SEVERE PUNISHMENTS BE EVENHANDEDLY IMPOSED

Eighth Amendment protection is not limited to excessive punishments. The evenhandedness and rationality of the criteria and procedures employed to select the subjects of a severe punishment also provide an established measure of the punishment's consistency with that amendment. The 1973 drug law is utterly lacking when tested against that measure. Certainly the district court's conclusion that petitioners' mandatory life sentences are unconstitutionally excessive would be inescapable under any statutory scheme that imposed this extraordinary punishment for such relatively minor offenses, no matter how carefully drawn or fairly implemented. New York's 1973 drug law, however, has proved to be anything but careful in design or fair in operation, adding another source of unconstitutionality to petitioners' sentences.

Between the A-felony classification, the definition of sale, and the aggregate weight standard, the law snares almost all drug offenders from the most marginal neophyte to the most ruthless recidivist. Through those same devices and in part by reason of unique plea bargaining restrictions

in effect at the time of petitioners' sentencings, the law crudely responds to each offense within this almost universal reach with the same severe penalty.

Additionally, a grant of unprecedentedly broad discretion to the parole board and a narrow ground for prosecutorial recommendation of probation have not ameliorated the indiscriminate nature of the law's harsh reach, but have created further unfairness. The effect of the drug law was not to eliminate discretion but massively to increase it. The legislation shifted discretion away from the courts, multiplied it, and then conferred it on agencies whose exercise of discretion is unguided by standards and virtually immune from any kind of control. Parole is available to those imprisoned under the 1973 drug law in a wholly standardless, unpredictable fashion, more so than for any other New York prisoners. In practice only the more serious offender can qualify for the prosecutor's probation recommendation.

In sum, the 1973 drug law consists of a broad, indiscriminating dragnet riddled with arbitrary loopholes. The irrationality in each facet of the statutory scheme that visited life sentences on the two women before this court firmly augments the conclusion below that those sentences are unconstitutional.

A. The Arbitrariness or Irrationality With Which a Sentencing Scheme Selects Subjects for Severe Punishment is a Relevant Measure of the Scheme's Inconsistency With the Constitutional Prohibition of Cruel and Unusual Punishments.

The Eighth Amendment incorporates a concern that such a severe penalty as life imprisonment not be imposed arbitrarily, under criteria and procedures that completely disregard the gravity of the type of offense involved. The Supreme Court's most comprehensive discussion of the concern may be found in the various concurring opinions in Furman v. Georgia, 408 U.S. 238, 256 (1972):

The high service rendered by the "cruel and unusual" punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary....

(Douglas, J.). More tersely, Justice Brennan found the "principle inherent in the Clause--that the State must not arbitrarily inflict a severe punishment." Id. at 274. See also id. at 309-10 (Stewart, J., concurring); id. at 310-14 (White, J., concurring); id. at 363-69 (Marshall, J., concurring).^{75/}

^{75/}

Justices Douglas and Brennan also noted the evidence that the progenitor of the Eighth Amendment, the English Bill of Rights of 1689, was concerned

primarily with selective or irregular applications of harsh penalties and that its aim was to forbid arbitrary and discriminatory punishments of a severe nature.

Id. at 242 (Douglas, J.); see id. at 274; see also Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839 (1969).

The controlling plurality in the 1976 death penalty cases applied this principle again and concluded that the ultimate punishment could constitutionally be imposed only through a sentencing procedure that would "minimize the risk of wholly arbitrary and capricious action," Gregg, supra, 96 S.Ct. at 2932, and that would "allow the particularized consideration of relevant aspects of the character and record of each convicted defendant...." Woodson v. North Carolina, 96 S.Ct. 2978, 2991 (1976). See also Roberts v. Louisiana, 96 S.Ct. 3001, 3006-07 (1976). En route to this position the plurality, citing Pennsylvania v. Ashe, 302 U.S. 51, 55 (1937), noted the Court's long-standing recognition that

[f]or the determination of sentences, justice generally requires...that there be taken into account the circumstances of the offense together with the character and propensities of the offender.

Gregg, supra, 96 S.Ct. at 2932. "Otherwise, 'the system cannot function in a consistent and rational manner.'" Id. at 2933, citing ABA Standards Relating to Sentencing Alternatives and Procedures §4.1(a), Commentary, p. 201.

The plurality applied the Eighth Amendment arbitrariness test to condemn mandatory death penalty standards for first degree murder, despite their ostensible evenhandedness. See Woodson, supra, 96 S.Ct. at 2990-92; Roberts, supra, 96 S.Ct. at 3006-08.^{76/} Those holdings and the

^{76/}

Note that Justice White, dissenting in Roberts in an opinion joined by Chief Justice Burger and Justice Rehnquist, (footnote continued)

approach taken in Furman make clear that the arbitrariness test is to be applied to the sentencing scheme in practice, as well as in design. Indeed, the mandatory death penalty cases indicate that a court must judge the operation of even a relatively new statute, particularly where, as in the case at bar, there is available to the court ample solid evidence of the law's effect.^{77/}

(footnote continued)

continues to apply the arbitrariness test of Furman, though he finds the statute before the Court meets that test. 96 S.Ct. 3012-14.

Concededly the plurality throughout the 1976 death penalty cases links the nonarbitrariness requirement to the unique nature of the death penalty. Nevertheless the arbitrariness of a noncapital penalty remains a relevant Eighth Amendment concern. The plurality in those cases labored through an agonizing analysis to find that the death penalty could constitutionally be imposed only through an elaborate procedure that assured each individual defendant an opportunity to put every possible mitigating factor before the sentencing authority, that provided guidelines for the consideration of aggravating and mitigating facts about the particular offender and offense, and that offered appellate review to guard against capricious action. See, e.g., Gregg, supra, 96 S.Ct. at 2932-37.

Petitioners do not contend that anything remotely resembling that elaborate procedure is a constitutional prerequisite to imprisonment for a drug related offense. Petitioners claim only that a court testing a severe punishment--and life imprisonment is the penultimate punishment--alongside the Eighth Amendment shall consider as one factor a sentencing scheme's wholesale disregard of variations in the seriousness of the offenses it covers and legislative conferrals of standardless discretion that result in arbitrary imposition or relief from punishment. Nothing in the 1976 death penalty cases suggests that arbitrariness, so viewed, is anything but an integral element of Eighth Amendment analysis tracing its legitimacy to the English Bill of Rights of 1689.

^{77/}

See notes 66-74 supra and 78-91 infra, and accompanying text.

The arbitrariness test has manifested itself in at least two ways. First, it gauges the extent to which a sentencing scheme accounts for the relative seriousness of the particular offenses within its scope, whether by statutory classification or individualized sentencing. This aspect took its most dramatic application in the condemnation of the mandatory death penalty statutes for failing to recognize the variations in heinousness even among first degree murderers. Similarly, in Ralph v. Warden, 438 F.2d 786, 788 (4th Cir. 1970), cert. denied, 408 U.S. 942 (1972), the court found the death penalty unconstitutional for a rapist who neither takes nor endangers the life of his victim, noting that rape was a crime for which "rational gradations of culpability" can be made.

Standardless discretion that operates capriciously to impose or excuse from severe punishment may also run afoul of the arbitrariness test. Particularly is this true where the sentencing provisions being reviewed themselves create the discretion, reflecting a legislative judgment that the punishment is not in fact universally proper while at the same time providing no guidance for its imposition. See Furman, supra, 408 U.S. at 314 (White, J., concurring). Furman, which embodies the foremost application of this principle, condemned the arbitrariness of statutes that entrusted the death penalty to a jury's unfettered discretion. Cf. Trop v. Dulles, 356 U.S. 86 (1957) (plurality

held denationalization an unconstitutional punishment for desertion, noting that the military's discretion to relieve deserters from this fate only compounded the problems created by the statute's harshness).

B. The 1973 Drug Law Imposes and Administers a Severe Punishment in such Arbitrary Fashion that the Punishment Contravenes the Eighth Amendment.

Numerous features of the 1973 drug law manifest arbitrariness of both Eighth Amendment varieties. The law metes out automatic life sentences for the great bulk of drug offenses with virtually no consideration of the vast variation in degrees of seriousness among them. It offers relief from that punishment only on a wholly standardless basis or on a ground that operates to reward more serious offenders.

1. The 1973 drug law subjects almost the entire range of drug offenders to the same grave penalty with no provision to take account of the vast difference in degrees of seriousness of their offenses.

The A felony category as redefined in the 1973 drug law encompasses the vast majority of narcotics offenses committed in New York, from the most marginal to the most serious, and subjects each offender to life imprisonment. Several devices conspire to create the law's indiscriminate net. First, the law classifies the sale, itself very broadly defined, or possession with intent to sell of any amount

of a narcotic drug as an A felony. Petitioner Fowler's \$20 sale of 0.13 gram of cocaine illustrates the extreme reach of this provision. Second, the 1973 legislation sharply reduced the amount of illicit substance simple possession of which is an A felony. Possessing a single aggregate ounce of narcotic, the crime of which petitioner Carmona stands convicted, brings the offender within the State's highest felony class. Previously New York classified that offense as a C felony; only possession of one pound or more achieved A felony status.^{78/}

The use of the aggregate weight standard in classifying A drug felonies heightens the arbitrariness of the 1973 law's scope. Because cocaine is sold in mixtures as weak as 5% pure,^{79/} looking to the aggregate weight of narcotic plus inert diluent may subject the holder of a truly minuscule amount of cocaine to the severe penalty for possession of an "ounce."

More confounding in its effect on the rationality of the 1973 scheme, however, is the aggregate weight standard's impact on the subclassification of A drug felonies ostensibly in relation to their seriousness. While all A felonies require a maximum of life imprisonment, the range of the mandatory minimum sentence is increased for A-II and A-I

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See notes 18-20, supra, and accompanying text.

^{79/}

See Turner v. United States, 396 U.S. 398, 401 (1970); E. Brecher, Licit and Illicit Drugs 303 (1972).

drug offenders. Sale of one-eighth aggregate ounce or possession of one aggregate ounce rises to the level of an A-II felony. Sale of one aggregate ounce or possession of two aggregate ounces is an A-I felony.

The aggregate weight standard renders illusory any relationship between these statutory classes and the seriousness of offenses. Drugs such as cocaine tend to be increasingly diluted as they proceed lower in the distribution chain. Particularly in light of the very small differences in amount that separate the A felony sub-classes, focusing on aggregate weight reduces the actual amount of narcotic handled to an irrelevancy and can only blur the distinctions between minor and serious drug offenders.

Confining its attention strictly to the context of the former drug law, under which whole numbers of ounces, not fractions, separated offenses, this Court has rejected a due process attack on the aggregate weight standard. See United States ex rel. Daneff v. Henderson, 501 F.2d 1180 (2d Cir. 1974). The Court, however, expressly recognized the possibility of "remarkably unjust results" from that standard's application under the then-new 1973 drug law imposing mandatory life imprisonment. Id. at 1185. That injustice and its arbitrariness in Eighth Amendment terms are now squarely before the Court.^{80/}

^{80/}

The aggregate weight standard and each of the other features of the drug law discussed in Part II. B. are relevant to petitioners' Eighth Amendment challenges to their sentences
(footnote continued)

In short, out of all drug offenders, even taking into account violators of the marijuana laws, the 1973 drug law through its aggregate weight standard and other broad definitional devices has classified the great majority in New York City and over half statewide as A felons, upon whom life imprisonment must be imposed.^{81/}

Moreover, a second unique feature of the drug law as it existed at the time petitioners were sentenced aggravated the blunderbuss character of the A drug felony classification. Until July 1, 1976, the drug law provided that no one indicted for an A felony could plea bargain out of that category. Persons charged with an A-I or A-II felony could plead down to an A-III; those charged with an A-III could plead only to an A-III.

(footnote continued)

and cannot be ignored by this Court, regardless of how "directly" any individual feature may have impinged on petitioners' particular cases.

In Gregg, supra, and Proffitt v. Florida, 96 S.Ct. 2960 (1976), the petitioners challenged the vagueness and overbreadth of statutory aggravating and mitigating factors that had concededly played no role in their trials. The Court considered those claims on the merits in order to determine "whether there is a substantial risk that the... [sentencing] system, when viewed in its entirety, will result in the capricious or arbitrary imposition of the death penalty." Proffitt, supra, 96 S.Ct. at 2967 n. 11. See also Gregg, supra, 96 S.Ct. at 2938.

The same perspective is required to assess the arbitrariness of the 1973 drug law that imposed life sentences on petitioners.

^{81/}

In New York City 75% of all drug indictments were for A felonies in 1974-75. (A. 118). Statewide the figure was over 50%. (A. 115). The remaining non-A felony cases include marijuana offenses. (Tr. 155).

This provision trapped in the A-III category many persons whom those charged with enforcing the law would not otherwise have held in that category with its attendant harsh penalties. The state's witness, Special Narcotics Prosecutor Sterling Johnson, testified at the hearing below that since the restriction's partial repeal, a substantial proportion of persons subject to A-III indictments are allowed to plead down to B or C felonies that do not trigger the mandatory life maximum (Tr. 160-61). Indeed, the Special Prosecutor's office has developed a policy which demonstrates that a significant class of drug offenders would not have been subjected to the penalties received by petitioners, absent the plea bargaining restriction:

We also have a policy, which is not a formalized policy yet but we hope it will be a formalized policy, that if you are arrested and you have, say, an eight [sic] of an ounce or more of heroin and you have maybe five misdemeanors or less, you will get a misdemeanor plea.

If it is heroin a year in prison, we negotiate for a year in prison. If it is cocaine, it is six months in prison.

...
Q. These will be people who will be permitted to plead to a B or a C in which you do not have the mandatory life and mandatory parole?

A. That's correct.

(Tr. 164-65) (emphasis added).^{82/}

^{82/}

Special Prosecutor Johnson dramatically applied this policy to the case of petitioner Donna Foggie. Petitioner Foggie received her mandatory life sentence for possessing \$40 worth of cocaine. Twenty-five years old, with custody of her eight year old son, Foggie had never been convicted
(footnote continued)

The plea bargaining restriction not only trapped minor offenders in the A-III category, it also operated to allow major offenders to plead down to that category. A defendant faced with an A-III indictment had no incentive to forego trial. Special Narcotics Prosecutor Johnson explained the result--the demands for trial among A-III defendants caused a backlog that forced prosecutors to accept pleas to lesser A felonies from those subject to A-I or A-II indictments (Tr. 160-61).

The Drug Law Evaluation Project confirmed Johnson's observation. Project Director Japha testified that, despite the far greater statewide incidence of A-I and A-II indictments than A-III indictments, 84% of all drug convictions in the state during 1974 and 1975 were for A-III felonies (A. 116). With respect to New York City, he explained:

We estimate that 29 percent of the cases which began in the Superior Courts as Class A-I indictments were disposed ultimately as Class A-II charges, and an additional 59 percent of A-I indictments were disposed as Class A-III charges.

(footnote continued)

of a criminal offense prior to the cocaine charge. (A. 47). Reviewing her probation report, Johnson testified:

A. I haven't finished reading this but based upon the pages I did read, I would say yes, I would allow this defendant to plead to maybe a C felony.

Q. Now, the fact is that because she was sentenced before July of 1976, she was not eligible for that treatment; am I correct?

A. That's right.

(Tr. 165).

Among Class A-II indictments, we estimate that 73 percent where [sic] ultimately disposed as Class A-III charges.

(A. 119).

The minimum sentences imposed on this mass of A-III felons conclusively demonstrate that the 1973 drug law in operation accords no significance to the widely differing degrees of seriousness among the offenses it covers and indeed disregards those distinctions implicit in its subclassification of A felonies. For the minimum sentences received by A-III felons bear no relationship to the charges on which they were originally indicted. A-III offenders originally indicted for A-I or A-II felonies receive the same minimums as all other A-III felons (A. 121). Indeed, in New York City those originally indicted on A-I or A-II charges have been slightly more likely to receive a lower minimum than the subjects of A-III indictments (A. 119-20).

In sum, the plea bargaining restrictions in effect at petitioners' sentencings sorely aggravated the already inescapable tendency of the 1973 drug law to steamroll all drug offenders, large and small, into a single class subject to an extraordinarily severe punishment. The provision eliminated whatever residue of rationality might have been found in the legislature's classification of offenses.^{83/}

^{83/}

Effective July 1, 1976, defendants charged with A-III felonies may plead down as far as a C felony. 1976 McKinney's New York Session Laws, Chapter 480. While a welcome recognition of a particularly offensive feature of the drug law, this
(footnote continued)

From indictment through sentencing, the 1973 drug law operates as a single crude, severe tool for punishing an extremely wide range of offenses, with virtually no mechanism, whether statutory classification or individualized sentencing, for taking into account factors relevant to the seriousness of a particular offense. The law comes down with equal severity on hardened recidivists and first offenders,^{84/}

(footnote continued)

change came too late for petitioners and indeed only heightens the arbitrariness of the former provision's continuing impact. Certainly petitioner Fowler, indicted only with an A-III felony, was directly affected by the repealed restriction. That restriction, however, was part and parcel of the scheme under which petitioner Carmona was sentenced, and it forms no less a part of her challenge. The relevance of this and the other irrational features of the sentencing provisions to petitioners' constitutional claims, regardless how "directly" any one feature affected either woman's particular case, is set forth at note 80, supra.

Moreover, the limited lifting of the plea bargaining restriction in no sense cured the ills of the 1973 law's indiscriminating approach to drug offenses. Those charged with A-I or A-II felonies still cannot plead out of the A category and its lifetime consequences. The effect of this restriction may be to magnify the arbitrariness of the aggregate weight standard used to determine the presence of the one-eighth aggregate ounce necessary for A-II possession. The plea bargaining restriction may still work to incarcerate for life someone guilty only of possessing more diluent than the A-III defendant who pleads down.

The district court did reject Foggie's due process and equal protection challenges to the former plea bargaining restriction. It did so, however, in a context that did not include the life maximum. That decision does not address the distinct question of the arbitrary impact of the restriction in the sentencing scheme that imposed lifetime incarceration on the petitioners.

84/

Approximately 32% of those defendants who received A felony sentences in 1974 were facing their first felony charge. (A. 124). Class A cases have involved amounts as small as \$10 worth of cocaine. (A.124).

on heroin and cocaine offenders alike,^{85/} indeed on all offenses within the broad class A definition, regardless of circumstances. In this respect the 1973 drug law stands in striking contrast to Governor Rockefeller's own statement in 1969 that certain amendments then made to the previous narcotics laws "properly distinguish between small scale sellers of hard-core narcotics who are often themselves addicted to the drugs they sell, and large scale sellers who reap enormous weekly profits from plying their insidious trade." Governor's Memoranda to Chs. 787 and 788, 1969 McKinney's New York Session Laws 2560.

2. The 1973 drug law's peculiar grants of standardless discretion to the prosecutor and the parole board ensure the arbitrary administration of its severe sanctions.

The means by which an A felon may be granted relief from the life maximum are themselves rife with arbitrariness and do nothing to compensate for the law's refusal to differentiate drug offenses according to relative seriousness.

Besides youthful offenders, the only A drug felons who may escape the mandatory life sentences altogether are those who receive a prosecutor's recommendation of lifetime probation on the basis of their cooperation. That recommendation, however, is available only to those offenders

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The 1973 drug law recognizes no distinction between these two drugs, despite the striking differences in their characteristics and the social problems they pose.

sufficiently well-informed to identify criminals higher up in the distribution chain (A. 127). Under the court's questioning below, the Special Narcotics Prosecutor acknowledged that the recommendation remains available to a repeat offender so long as he continues to provide information (Tr. 183). In short, the recommendation of lifetime probation provides relief from the harshness of the 1973 drug law only to the more serious A felons.^{86/}

Release from lifetime incarceration is available to the vast bulk of A drug offenders only at the discretion of the Parole Board. The 1973 drug law vested in the Parole Board a range of discretion unique to New York law, entrusting that body to determine whether a prisoner should be released at the end of his or her minimum, which may be as short as one year, or at any subsequent time during the rest of the prisoner's natural life.^{87/} Despite the unprecedented nature of this prerogative, the legislature conferred it

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In any case, the provision affects no more than 10% of class A drug defendants. (A. 127).

^{87/}

The next broadest sentencing span under New York law is the very different A-I felony span, ranging from a minimum of 15 to 25 years to a maximum of life. This range at least tells the Parole Board that the offender is to serve a long term of incarceration. The A-III span does not offer even this guidance. Aside from drug offenses, however, New York in any case reserves the A-I span for those guilty of second degree murder, N.Y. Penal Law §125.25; first degree arson, N.Y. Penal Law §150.20; and first degree kidnapping, N.Y. Penal Law §135.25. See notes 38-40, supra, and accompanying text.

without offering the Board any guidance for its implementation. In practice, the discretion placed in the Parole Board has borne even more unpredictable, arbitrary results out of a decision making process that was already overburdened, standardless, and unreviewable. The effect has again been not to rationalize the drug law's reach, but to heighten the anguish of class A drug offenders who all look to the Board with complete uncertainty as their only source of relief from life imprisonment.

This Court has recognized the enormously broad statutory charter governing the Parole Board's release decisions. Under N.Y. Correction Law §213, the Board may permit release only if it finds that

there is reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law, and that his release is not^{88/} incompatible with the welfare of society.

In United States ex rel. Johnson v. Chairman, New York State Bd. of Parole, 500 F.2d 925, 929 (2d Cir.), vacated as moot, 419 U.S. 1015 (1974), this Court characterized that standard as "extremely vague," described the Board as "vested... with apparently unfettered discretion," and noted that its

^{88/}

The Act of August 11, 1977, section 1977 McKinney's New York Session Laws, Ch. 904, repealed N.Y. Correction Law §213, effective January 1, 1978. The repealer, however, merely transferred this language to a new Executive Law §259-i(2)(c), adding that the prisoner's release must "not so deprecate the seriousness of his crime as to undermine respect for law." On the effect of this revision, see note 90, infra.

"special competence to make the types of predictions called for by N.Y. Correction Law §213...has been questioned." See also Williams v. Ward, 556 F.2d 1143 (2d Cir. 1977); Haymes v. Regan, 525 F.2d 540 (2d Cir. 1975). David Rudenstine, Director of the Citizens' Inquiry on Parole and Criminal Justice, which recently performed an exhaustive study of the parole system in New York, testified without contradiction that the Board in fact looks to factors that are ill-defined, inconsistent, and frequently unrelated to the character of the individual or his crime, such as the publicity that surrounded his trial (A. 136-40; 148-49).

The complete absence of procedural devices to rationalize decision making under this meaningless standard are also known to this Court and may be briefly highlighted. Most parole hearings last from six to twelve minutes; three members of the Board compose the hearing panel, but two are scanning files for later hearings while the other conducts a perfunctory interview with the inmate (A. 140-42). He will have scanned, during another Board member's interview of a different inmate, a case file that may often contain inaccurate information (Tr. 144-45). The decision takes no more than three or four minutes; it is administratively and judicially unreviewable (A. 143).^{89/} While in

^{89/}

On the continuing absence of meaningful administrative review under §259-i(4) of the Act of August 11, 1977, section 3, 1977 McKinney's New York Session Laws, Ch. 904, see note 90, infra.

response to decisions of this Court and legislative change the Board now gives reasons for denying parole, those statements are so vague and general as to be meaningless to the inmate concerned for his or her future (A. 144).^{90/}

The result of this decision making process devoid of both substantive standards and procedural safeguards is not surprising: a total lack of predictability in the Board's decisions. Rudenstine testified that, even within ordinary sentencing ranges, one cannot predict with any

^{90/}

Whatever guidelines for parole release may eventually be developed under §259-i(2)(C) of the Act of August 11, 1977, Section 3, McKinney's New York Session Laws, Ch. 904, (to be codified at Executive Law §259), that statute holds out little, if any, prospect of decreasing the arbitrariness of the decision making process in fact. In the first place, while the section lists some factors that the future guidelines must require the Board to consider, it offers no suggestion how the Board is to consider those factors. In this sense the statute requires only some change in the information to be placed before the Board, not any real provision of substantive standards for decision making. Second, the one amendment to the actual standard for release adds only another dimension of vagueness. To the language formerly found in N.Y. Correction Law §213, the statute has added the requirement that parole release of an individual "will not so deprecate the seriousness of his crime as to undermine respect for law." Finally, the statute eliminates none of the marked procedural deficiencies in the parole release decision which may well negate any positive effect that might otherwise have emerged from the guidelines to be developed under §259-i. The limited provision for review of the parole release decision in §259-i(4) is itself standardless and does not even require the Board to develop standards for review or to furnish appellants the barest statement of reasons for any decisions it may make.

In short, whatever positive steps might be taken by those who implement it, the statute itself, which is all that petitioners or this Court can presently look to for an understanding of parole release in New York, contains no indication of any significant rationalization of the decision making process.

certainty that the Board will treat similar cases similarly (A. 147-48).

More important for purposes of the case at bar, the unparalleled discretion conferred on the Board by the 1973 drug law has exacerbated the arbitrariness of its decisions. The Board frequently follows an informal rule of thumb releasing a prisoner upon completion of one-third of the maximum term (A. 150). The life sentence imposed on all Class A drug offenders makes that measure inapplicable. Accordingly, Rudenstine concluded that "a life term increases the possibility of uneven or disparity [sic] treatment of offenders by the Parole Board" (A. 149-50). Even with respect to an A-III offender guilty of giving \$10 worth of cocaine to a friend, Rudenstine could not predict with any certainty when that person would be paroled (A.151).

Lastly, parole release is anything but final. Given their life maximums, paroled A drug felons will be subject to a lengthy period of supervision. Indeed, while the mandatory life parole provision of the 1973 drug law has been repealed, A felony parolees continue to have no right to release from supervision for the remainder of their lives. Act of August 11, 1977, section 3, § 259-j; 1977 McKinney's New York Session Laws, Ch. 904. And whatever its duration, that supervision intrudes upon and restricts the most petty details of everyday life.

The conditions of parole release in New York are the most stringent in the nation (A. 157); see also Standard Certificate of Release on Parole (A. 216). Parolees here face a host of reporting requirements and restrictions on residency, travel, change of employment, and marriage, to name but a few (A. 102-10; 151-56; 220-24). They must waive protection against unreasonable searches and seizures (A. 158). Parole officers have wide discretion to impose additional requirements, including restrictions on associates (A. 163-64). Edward Elwin, the highest New York official directly concerned with the noninstitutional aspects of parole on a full time basis, testified that no violation of these conditions, however minor and however long the parolee has been released, is ever ignored (A 222; 225-56). William Cashel, responsible for supervision of all parolees in New York City, echoed this testimony and added that parole officers detect even minor violations at a high rate (A. 108-10).

These conditions and their enforcement make very real the threat to paroled A felons of lifetime reincarceration. As Rudenstine concluded:

I think everybody agrees pretty much that we talked to during the course of the study, that is, parolees and parole officials alike, that anyone trying to live in accordance with all the conditions that are in effect in New York State would find it impossible over a long period of time.

(A. 165-66). In fact, Department of Correctional Services

statistics show that over 40% of the persons released on parole in New York are returned to prison within three years. (A.169-70). This threat again holds out severe punishment arbitrarily, regardless of original offense. The first-time drug offender, who has already suffered incarceration under a life sentence, must take care not to cross the county line over the weekend, for fear of returning to prison for life.

In sum, the 1973 drug law created a degree of discretion unique to New York penal law and conferred it upon a decision making body already plagued by material substantive and procedural deficiencies. The result was not to ensure that all drug offenders would serve prison sentences somehow related to the gravity of their offenses or the strengths and weaknesses of their characters, but pointlessly to lengthen the shadow of the life maximum that hangs over the head of each, even those to whom parole is eventually granted.^{91/}

^{91/}

Of course, the Eighth Amendment is not the only Constitutional bulwark against arbitrariness and caprice. The very essence of the Fourteenth Amendment's Due Process Clause is the "protection of the individual against arbitrary action" by the government. Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 302 (1937) (Cardozo, J.). And as Justice Harlan observed, dissenting in Poe v. Ullman, 367 U.S. 497, 543 (1961), the Due Process Clause guarantees "freedom from all substantial arbitrary impositions and purposeless restraints." Thus, to the extent that the 1973 drug law administers severe punishments in an arbitrary fashion, it contravenes not only the Eighth Amendment but the Fourteenth as well.

CONCLUSION

The starting and focal point to petitioners' challenge is the extreme severity of their mandatory life sentences in relation to the seriousness of their offenses. The disproportionality of those sentences leaps from New York's more lenient treatment of murderers, rapists, and armed robbers and from the universally lighter penalties imposed by other American jurisdictions for petitioners' offenses. Moreover, the 1973 drug law has increased neither deterrence nor isolation, only punishment. Grossly disproportionate and pointless, petitioners' life sentences are on either count unconstitutionally excessive.

Looking beyond the stark fact of that excessiveness, one finds that petitioners were sentenced pursuant to a statutory scheme that brings the same grave penalty down on the broadest range of offenders with absolutely no mechanism for adjusting that penalty to the seriousness of an offense. The probation and parole provisions of that scheme assure that release too will not reflect the seriousness of an offense or the capacity of the offender for productive citizenship. In adjudicating the constitutionality of their sentences under the Eighth Amendment, this Court must consider alongside the excessiveness of those sentences the absence of evenhandedness and rationality that plague the 1973 drug law throughout. In its every aspect the 1973

drug law creates grave risk that its severe sanctions will bear no relation to the offenses for which they are imposed. Together with the bald excessiveness of petitioners' incarceration, the arbitrariness of the 1973 drug law unequivocally condemns those sentences as cruel and unusual.

WHEREFORE, petitioners respectfully pray that the judgment of the district court be AFFIRMED.

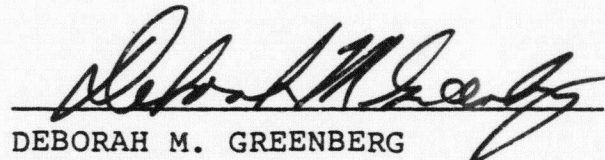
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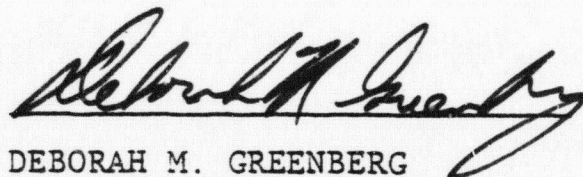
Patrick R. Cowlshaw, a graduate of Stanford Law School, who has not yet been admitted to practice in New York State, assisted in the preparation of this brief.

CERTIFICATE OF SERVICE

This is to certify that on this 28th day of Novmeber, 1977, I served two copies of the Brief for Petitioners-Appellees and one copy of the accompanying motion for permission to file a brief exceeding 70 pages in length upon the following counsel by United States Mail, postage prepaid.

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